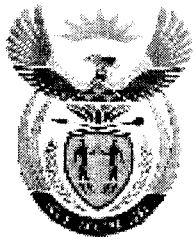


IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 9937/08

In the matter between:

CHICKENLAND (PTY) LTD
trading as NANDO'S — Applicant

and

RZT ZELPY 4699 (PTY) LTD — First Respondent
MATULE PATIENCE HEADBUSH — Second Respondent
ALFRED CECIL THEMBA MTHIMKHULU — Third Respondent
SOLOMON TSHIKI — Fourth Respondent
RZT ZELPY 4698 (PTY) LTD — Fifth Respondent

AND

CASE NO. 9939/08

CHICKENLAND (PTY) LTD
trading as NANDO'S — Applicant

and

FINISHING TOUCH TRADING 230 (PTY) LTD — First Respondent
MATULE PATIENCE HEADBUSH — Second Respondent
ALFRED CECIL THEMBA MTHIMKHULU — Third Respondent
SOLOMON TSHIKI — Fourth Respondent
RZT ZELPY 4698 (PTY) LTD — Fifth Respondent

JUDGMENT : 17 JUNE 2010

TRAVERSO, DJP:

[1] This is an application for leave to appeal against a judgment handed down on 23 April 2010.

[2] Before dealing with the application it is necessary to set out the background to this matter.

[3] The respondents initially opposed this application on the following basis:

They contended that they were released from their obligations as sureties because the applicant acted in a manner which was prejudicial to their positions as sureties. This defence was based on two grounds. Firstly it was contended that the applicant's *modus operandi* was to deliberately set up its franchise outlets for failure by, *inter alia*, failing to facilitate credit arrangements for the purchase

of stock. When the franchise agreement is cancelled because the outlet failed, the applicant would then resell it at a bargain price to its friends.

Furthermore, it was contended that after the respondents' outlets had failed, the applicant concluded an oral agreement with the first respondent regarding the disposal of the franchise outlets. It was contended that the subsequent conduct and the disposal of the various outlets should have been governed by this oral "*disposal*" agreement. The first respondent, so it was alleged, disposed of the outlets in breach of the terms of the oral disposal agreement. It was therefore alleged that because the applicant's conduct in disposing of the outlets was contrary to the provisions of the oral disposal agreement, it was prejudicial to them as sureties and that therefore they were released as sureties.

[4] The applicant in its replying affidavit denied the existence of the alleged oral disposal agreement and

contended that, in any event, such oral agreement would be unenforceable due to various provisions in the franchise agreement, *inter alia*, the provision which provides that no variation or cancellation will be of any force and effect unless in writing.

[5] As an alternative argument the applicant contended that the alleged oral disposal agreement was superceded by the cancellation agreement and that the cancellation agreements constitute a novation of the oral agreement. There was, in this regard, no reference whatsoever to the original franchise agreement.

[6] Mr. Pincus latched on to this sentence which was contained in the applicant's replying affidavit as a basis for his argument that the cancellation agreements constituted a novation of the franchise agreements and that the suretyship agreements were not wide enough to cover obligations arising from a novation of the original franchise agreements.

It is not something that was ever raised in the papers by the respondents.

[7] On this aspect no new arguments were addressed, and I accordingly have nothing to add to my judgment. Suffice it to say that the cancellation agreement did not create any new obligations which would not normally flow from the cancellation of a contract.

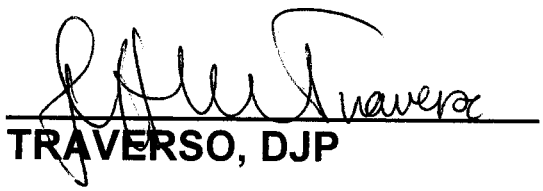
[8] Other arguments were put up in the heads – which similarly were not raised in the papers. Yet more arguments were presented orally which were not even dealt with in the heads. In fact Mr. Pincus made a point of distancing himself from the contents of the opposing affidavit – stating that neither he nor his attorney had anything to do with the drafting of the papers. Of course a party can argue matters which are not pertinently raised on the papers, but then, at the very least, there must be a factual basis for the argument. In this case the factual basis was wanting.

[9] It was argued that I did not deal with the respondents' arguments in my judgment. This submission is somewhat opportunistic. The argument regarding the so-called "*provisions of 12.8 and 23 hereof*", was ventilated fully in argument". During the course of the debate between myself and Mr. Pincus I made my view clear that I thought the submission was without any substance whatsoever (and in any event not raised on the papers), whereupon he invited me to do with his argument as I please. I chose to deal with it no further, as in my view, it was so without substance that it did not warrant further discussion.

[10] The same applies to the argument that the cancellation agreement fell short of compliance with the franchise agreement. The cancellation agreement was, despite earlier denials by the respondents, signed by all the relevant parties and the fact that reference was made to RZT Zelpy (Pty) Ltd and not RZT Zelpy 4699 (Pty) Ltd is accordingly irrelevant. I

do not believe that it is required of a Court to deal with all arguments raised – even those that are wholly untenable. [See R. v. Dhlumayo & Another, 1948(2) SA 677 (AD) at 702.] The fact that this matter involved a trial makes no difference. The principle remains the same.

[11] In the circumstances I am satisfied that there is no reasonable prospect of another Court coming to a different conclusion, and the application for leave to appeal is dismissed with costs.



TRAVERSO, DJP